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In The

Supreme Court of the United States

October Term, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the absence of ongoing tribal proceedings, do this Court's decisions in *National Farmers Union* and *Iowa Mutual* require a federal court to abstain from deciding whether nonmembers living within the exterior boundaries of an open reservation are subject to tribal civil regulatory jurisdiction over farm and ranch activities conducted by nonmembers on their own fee land?

2. Do this Court's decisions in *Montana*, *Brendale*, and *Bourland* require a federal court, in the absence of ongoing tribal proceedings, to adjudicate the federal question whether nonmembers living within the exterior boundaries of an Indian reservation which Congress opened to settlement by nonmembers are subject to tribal civil regulatory jurisdiction over farm and ranch activities conducted by nonmembers on their own fee land?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Ross Middlemist, Wayne Maughan, and Flathead Joint Board of Control (hereinafter collectively referred to as "the Irrigators"), respectfully request that this Court, pursuant to 28 U.S.C. § 2101(e), issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the Order entered in this matter on April 6, 1994.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the District of Montana has been reported at 824 F. Supp. 940 (1993) and is printed in the Appendix to this Petition at A-1 through A-15. The order of this Court denying the petition for writ of certiorari before judgment of the United States Court of Appeals for the Ninth Circuit is reported at ___ U.S. ___, 113 S.Ct. 2950 (June 7, 1993) and is printed in the Appendix to this Petition at A-16. The order of the panel of the United States Court of Appeals for the Ninth Circuit affirming the decision of the district court has been reported at 19 F.3d 1318 (April 6, 1994) and is printed in the Appendix to this Petition at A-17.

JURISDICTION

The United States District Court entered its Order February 12, 1993. Jurisdiction was conferred by 28 U.S.C. § 1331 and 28 U.S.C. § 1361. The United States Court of Appeals for the Ninth Circuit entered its order on April 6,

1994. The jurisdiction of the Court of Appeals was conferred by 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, Treaty, statutes, ordinance, and regulations, relevant portions of which are set out verbatim in the Appendix:

Constitution of the United States of America, Article IV, § 2, Amendment V, Amendment IX, Amendment X, Amendment XIV, § 1, Amendment XV.

Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302.

General Allotment Act, Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. §§ 331 *et seq.*

Act of May 29, 1908, 35 Stat. 448.

Act of May 10, 1926, 44 Stat. 453, 464.

Declaratory Judgment Act, 28 U.S.C. § 2201.

Confederated Salish and Kootenai Tribes' Ordinance 87A, Aquatic Lands Conservation Ordinance (ALCO).

ALCO Regulations.

STATEMENT OF THE CASE

The underlying issue raised by the Irrigators in their complaint is whether tribal governments have inherent sovereign authority over nonmember farming and ranching activities conducted on their own fee land within the exterior boundaries of a reservation opened by Congress to nonmember entry and settlement under the Homestead laws of the United States. This petition raises the specific issue whether, in the absence of ongoing tribal proceedings, a federal district court must adjudicate the right of nonmembers to conduct such farming and ranching activity on their own fee land free from tribal government regulation or whether the federal district court is required, instead, to defer to tribal administrative and judicial processes.

The Irrigators here do not contest the legitimacy of tribal sovereignty or tribal authority over those who are members and have consented to tribal government. Nor do they contest tribal sovereignty over land owned by a tribe or held in trust for it. But they strenuously dispute the legitimacy of tribal assertions of authority over nonmember activity on their own fee land on a reservation which was opened to nonmember settlement by specific Acts of Congress. They also strenuously dispute the federal defendants' approval of and support for the tribal assertion of inherent sovereignty over them. This case, then, has broad policy and practical applications for both the proper role of federal courts in vindicating federal rights in such controversies where there are no ongoing tribal proceedings and the proper application of the principles established by this Court in its decisions concerning tribal sovereign power over nonmembers.

1. Petitioners and the Area Immediately Involved.

The salient facts presented by Petitioners, Ross Middlemist, Wayne Maughan, and The Flathead Joint Board of Control (JBC)[1], are simple, arising frequently on reservations Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers: The individual Petitioners are not members of the resident Confederated Salish and Kootenai Tribes (CSKT) (Complaint, paragraphs 1, 4, 6, A-20,22)[2]; they

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[1] The JBC is a local governmental entity formed under the statutes of Montana to act as a central operating authority for the three irrigation districts which comprise it. (§§ 85-7-1601, et seq., MCA.) The Montana state statutes pertaining to irrigation districts are found at Title 85, Chapter 7, Parts 1-22. Congress specifically authorized the creation and operation of these irrigation districts pursuant to state law. Act of May 10, 1926 (44 Stat. 453, 464). A-55, 57. Included in the 70-odd statutes enacted by Congress specifically addressing the irrigation project which delivers water to these districts is a provision in the authorizing Act of May 29, 1908 (35 Stat. 448) calling for the transfer of the operation and management of the irrigation project to the landowners it serves. These landowners, tribal members and nonmembers, are now represented, with the approval of Congress, A-55,57, by state-chartered irrigation districts, which are local governmental entities under state law.

[2] The Complaint is in the Appendix at A-19 to A-39. When referencing the Complaint, Petitioners provide citations to specific paragraphs in the Complaint as "C-___" and the Appendix as "A-___." Under the standards applicable to motions to dismiss, Rule 12(b)(6), Fed.R.Civ.P., the well-pleaded factual allegations of the Complaint are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (reversing decision upholding grant of motion to dismiss in civil rights action).

own their land in fee and acquired it pursuant to the allotment laws of the United States (C-11, 20; A-23, 25);[3] their land is situated in an "open" area of the Flathead Indian Reservation which is completely agricultural in nature and has lost any unique character it might have

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[3] In 1859 Congress ratified the Treaty of Hellgate, signed July 16, 1855, 12 Stat. 975, and set aside the Flathead Indian Reservation, located in northwest Montana.

In 1904 Congress enacted the Flathead Allotment Act ("FAA"), directing the Secretary of Interior ("Secretary") to make allotments "under the provisions of the allotment laws of the United States" to tribal members. Act of April 23, 1904, 33 Stat. 302, A-52; see also General Allotment Act ("Dawes Act"), 24 Stat. 388, as amended, 25 U.S.C. §§ 331, *et seq; Montana v. United States*, 450 U.S. 544, 559, n. 9 (1981). In keeping with the General Allotment Act policies, Congress also directed the Secretary to open the remaining lands to nonmember entry and settlement pursuant to the "general provisions of the homestead, mineral, and town-site laws of the United States. . . ." FAA § 8; A-53. In keeping with these same policies, Congress granted "sections sixteen and thirty-six of each township" to the State of Montana for school purposes. FAA § 8; A-53.

In 1908 Congress authorized the creation of the Flathead Irrigation Project to serve both tribal members and nonmembers. Act of May 29, 1908, § 15, amending § 14 of the FAA. A-56. In the 1908 Act, Congress provided for the transfer of the operation and management of the Project to the landowners it serves. A-56.

In 1926 Congress authorized the landowners served by the Flathead Irrigation Project, tribal members and nonmembers, to form irrigation districts "organized under State law. . . ." Act of May 10, 1926, 44 Stat. 453, 464 ("1926 Act"); A-57. In keeping with the allotment era policies then in force, in the 1926 Act Congress specifically provided that all fee patent land, including land formerly under trust patents (allotments) for which fee patents were issued, "shall . . . be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts." *Id.*; A-56.

had when in tribal possession (C-47-70; A-30-33); they cannot be excluded from their land (C-65, 66, 68, 69; A-33); they wish to undertake on their land small projects common in the course of farming and ranching (C-12, 13, 23, 24, 25; A-24, 26); the CSKT tribal government has, nevertheless, asserted it has jurisdiction to regulate their land use and to enforce compliance by unpermitted access to private land for inspections, by issuing compliance and removal orders, by levying fines of up to $500.00 per day, and by removing projects, at the landowner's expense, not voluntarily brought into compliance. (C- 1, 34, 41-46; A-21, 28, 29-30; see also A-40-46.)[4]

Mr. Middlemist, a third-generation rancher on the Flathead Reservation, residing in Sanders County, Montana, must replace a dilapidated stock water tank fed by a small natural spring which arises on his own property and, after running approximately 100 yards, disappears

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[4] Situations of this type arise frequently on reservations which Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers. *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408, 436, n. 1 (1989). Nationally, of the 780,028 people living on Indian Reservations, at least 47.3 percent are not tribal members. U.S. Department of Commerce, Bureau of Census, News Release July 11, 1991, Table 1. As a result of the General Allotment Act and other Acts of Congress opening the Flathead Reservation, nonmembers now own in fee (according to the tribal government's statistics) 490,120 acres of the 1.2 million acre Reservation; and, of the 113,000 acres within the three irrigation districts which comprise the JBC, approximately 90 percent is owned in fee by nonmembers. Of the Reservation population of 21,259, only 3,000, or 14 percent, are tribal members.

into the ground, still on his property. (C-11, 12; A-23, 24.) He is not a tribal member and has no voice in the CSKT tribal government (C-4; A-22).[5]

This project comes within the asserted jurisdiction of the CSKT tribal government under its Aquatic Lands Conservation Ordinance ("ALCO"), also known as tribal ordinance 87A. (C-1, 34; A-21, 28.) The Agricultural Stabilization and Conservation Service ("ASCS") reaffirmed this when it informed Mr. Middlemist that, while the project qualified for federal funding of $1,050.00, such funding would be withheld until he obtained a tribal permit pursuant to ALCO (C-14, 15, 17; A-24, 25).[6]

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[5] The fundamental right to participate fully in the government process, including participation in the formulation of laws embodying social policy choices by which one must abide, is the primary consideration given by the government in exchange for the consent of the governed. See, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); see also, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

The extraconstitutional nature of tribal power – both its origin and obligations to those it would govern – as the basis of tribal authority over nonmembers requires that it be narrowly limited and clearly defined. The extraconstitutional nature of tribal power is "all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990) (citing the dissent, Stevens, J. in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982)). See also *Oliphant v. Schlie*, 544 F.2d 1007, 1014-1019 (9th Cir. 1976) (Kennedy, J. dissenting), *rev'd Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[6] This permit requirement is in addition to applying for permits from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks. (C-15; A-24.)

Like Mr. Middlemist, Wayne Maughan, a second-generation farmer on the Reservation, residing in Lake County, Montana, is not a tribal member and has no voice in tribal government affairs. (C-6, 20; A-22, 25.) In cooperation with the JBC and utilizing funds provided by the JBC for a water conservation demonstration project,[7] Mr. Maughan desires to repair a small dam located on his own fee land. (C-23, 24, 25; A-26.)

This project is also within the asserted jurisdiction of the tribal government under ALCO. Like Mr. Middlemist, Mr. Maughan and the JBC were advised by the U. S. Army Corps of Engineers that, in addition to applying for a variety of federal, state and local government permits and approvals,[8] they had to apply to the CSKT for a

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[7] The JBC has participated in this project because it will improve water quality by greatly reducing or eliminating discharges from the small reservoir behind the dam through increased storage capacity and reuse of irrigation return flows, and because by capturing more runoff and irrigation return flows for reuse, the need of Mr. Maughan for deliveries of water to his farm will be decreased, thereby making more water available for upstream irrigators. (C-24, 26, 27; A-26.) Accordingly, the JBC passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside $3,000.00 to help pay for the project. (C-25; A-26.)

[8] Mr. Maughan and the JBC have applied for a "404 permit" from the Army Corps of Engineers pursuant to the Federal Clean Water Act; a Montana Pollutant Discharge Elimination System ("MPDES") permit from the State Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES"); a "124" Stream Preservation Act permit from the Montana State Department of Fish, Wildlife and Parks; a "310" Natural Stream Bed and Land Preservation Act permit from the Lake County Soil Conservation District; a "3A" permit related

permit pursuant to Tribal Ordinance 87A as a condition precedent to undertaking the proposed conservation activities. (C-30; A-28.)

Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance ("ALCO"), purports to regulate all activity – no matter how minor – planned on wetlands located within the exterior boundaries of the Reservation, whether that land is owned by the United States or the CSKT, tribal members, or, as in the cases of Messrs. Middlemist and Maughan, by non-members who propose to undertake activity on their own fee land. (C-34, 41, 42, 43; A-28, 29.)[9]

The Tribal Department of Natural Resources administers ALCO through the Shoreline Protection Office ("SPO"). (C-38; A-29.) The terms of ALCO require the submission of plans to the SPO for review, approval, modifications, rejection, and issuance of a permit for any project on wetlands prior to doing any work. (ALCO, Part

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to a short-term turbidity variance during construction, from the DHES; and a flood plain development permit from the Department of Natural Resources and Conservation. (C-29; A-27.)

[9] The tribal government has advertised the applicability of ALCO throughout the Reservation as follows:

> Private individuals; corporations, local, county, state, tribal and federal government agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation *must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.*

(Emphasis in original.) (A-47.) This advertisement was attached as Exhibit D to the Irrigators' brief in response to the Tribes' motion to dismiss.

4, §§ 1, 3; A-40, 41.) ALCO imposes fines of up to $500.00 per day for each violation of its provisions, including failure to submit plans, acquire a permit, comply with conditions and modifications dictated by the SPO, or continuance with a disapproved project. (ALCO, Part 6, § 2, ALCO Regulations, §§ 5.1, 5.9; A-41-44.)[10] It also provides for the imposition of remedial measures at the expense of the noncomplying person, as well as removal of a project and restoration of the physical surroundings. (ALCO, Part 6, § 2, R. 5.5, 5.7, 5.8, 5.9; A-41, 42, 44-46.) The ordinance also authorizes warrantless and unpermitted access to any property within the Reservation if a violation is suspected. (ALCO, Part 6, § 1; A-41.)

2. The Complaint and Decisions Below.

The Petitioners challenge the CSKT's assertion of regulatory jurisdiction over their activities on fee land as patently unconstitutional and violative of the limits of tribal jurisdiction established by Acts of Congress and this Court's decisions. *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993). Despite this conviction, they fear the imposition of heavy fines and penalties if they do not submit to tribal authority. Consequently, they sought declaratory and injunctive relief in the United States District Court for the District of Montana, naming federal and tribal defendants for their part

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[10] Hereinafter ALCO Regulations are cited as "R. ___."

in promulgating, approving, implementing, and supporting the application of ALCO against the Plaintiffs.[11] (Complaint; A-19-39.)

The federal and tribal defendants moved to dismiss on various grounds. In granting these motions the district court erroneously interpreted *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and Ninth Circuit applications of those decisions to allow abstention even in the absence of ongoing proceedings.[12] In dismissing the Irrigators' argument that an exception to the doctrine was present here because the CSKT's assertion of jurisdiction patently violates the Constitution and the limits of tribal jurisdiction defined by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Bands of Tribes of the Yakima Nation*,

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[11] The Plaintiffs named the individual tribal government officials as Defendants based on the principles of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), and its progeny, which are applicable to tribal government officials acting beyond their legal authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see also *BNRR v. Blackfeet Tribe, et al.*, 924 F.2d 899, 901-902 (9th Cir. 1991) ("Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.")

[12] The Conference of Western Attorneys General in *American Indian Law Deskbook*, at 122-131, point out some distinctions in these decisions , including that the Court primarily employed the terminology of "deferral" and "exhaustion" of tribal remedies. While the comment is literally correct, the most important factor in each of these cases is that proceedings were ongoing in tribal courts. The paradigm employed by the Court, and the one urged by the Respondents and amici, particularly in *National Farmers Union*, was *Younger* abstention. See n. 14, *infra*.

492 U.S. 408 (1989) (*South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993) had not yet been decided), the district court below refused to rely on or even examine this Court's decisions defining tribal civil regulatory jurisdiction over nonmembers on fee land or to credit the constitutional arguments raised by the Irrigators.[13]

The Court of Appeals in its order affirmed the decision of the district court below without any further explication of the reasons set forth in the trial court's opinion.

The Irrigators thus are seeking review by this Court of their right to be heard by a federal court and not be

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[13] The district court, in fact, flatly refused to examine whether the assertion of tribal authority here was constitutional on the grounds that the cited exception to the abstention doctrine did not encompass patent violations of the Constitution. (A-12.) This is clearly incorrect as a matter of precedent and logic. In the *Younger* abstention context, from which these exceptions were imported into federal Indian law, this exception includes actions patently violative of the Constitution. *Younger v. Harris*, 401 U.S. 37, 53-54 (1971); quoted in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 366 (1989); see also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 (1984); *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1361, n. 12 (9th Cir. 1986). As a matter of logic, actions patently violative of the Constitution are perforce violations of jurisdictional limits. If not, the absurd result is that abstention would not apply to a clear violation of a statutory jurisdictional limit or one based on case decisions finding federal preemption, cf., *Norfolk & Western Railway Co. v. PUC of Ohio*, 926 F.2d 567, 572-573 (6th Cir. 1991), but challenges to blatant constitutional violations would be subject to abstention and all the delay in rectifying a clear violation of constitutional rights that entails.

required to exhaust tribal administrative and judicial processes which have not been instituted and whose very jurisdiction over them they dispute.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decisions of the Courts Below Requiring that Federal Courts Defer to Tribal Administrative and Judicial Processes Even in the Absence of Ongoing Tribal Proceedings Conflict with Established Principles of Abstention Enunciated by this Court and Grant Greater Deference to Tribal Proceedings than to State Proceedings.

The lower court decisions to abstain from resolving the federal questions presented in the Irrigators' complaint, even in the absence of ongoing tribal proceedings, conflict with the basis of this Court's decisions in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). The courts below failed to consider the jurisprudential underpinning of the tribal abstention doctrine; namely, *Younger* abstention. In so doing, the lower courts misapplied the precedents of this Court.

The tribal abstention doctrine is clearly premised upon the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). The only abstention decisions cited in *National Farmers Union* were *Younger* abstention cases; and, the same is true for the *Iowa Mutual* decision, except for one reference to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which

allows abstention only in even narrower and more exceptional circumstances than *Younger*. And, both *Younger* and *Colorado River* require that there be ongoing proceedings before the federal court is required to show such deference. Moreover, the exceptions to *Younger* abstention and the tribal abstention doctrine are identical. *National Farmers Union*, 471 U.S. at 856, n. 21, citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977); *Iowa Mutual*, 480 U.S. at 19, n. 12. The reasoning and policies behind *Younger* abstention, therefore, should apply here.[14]

The central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding in favor of which the federal court should abstain. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989). If there is no ongoing state proceeding and a plaintiff has invoked the federal court's jurisdiction, *Younger* abstention does not apply. "[T]he relevant principles of equity, comity and federalism have little force in the absence of the pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974).

In both *National Farmers Union* and *Iowa Mutual*, the federal district court was faced with a request to interfere with ongoing tribal court proceedings. In *Iowa Mutual*,

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[14] The Respondents in *National Farmers Union*, as well as the Solicitor General and other supporting amici, relied heavily on the existence of ongoing proceedings in that case to support federal court abstention. See, Brief of Respondent Crow Tribe at 14-17; Brief of United States, Questions Presented; Brief of Amici Assiniboine & Sioux Tribes, et al., at 21-23, citing Wright, Law of Federal Courts § 16 (1976) and *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

the Court expressly held that, before abstaining, courts must find "considerations of comity" justifying abstention. *Id.*, at 15-16. Thus, a central element of the Court's decision in those cases to allow district courts to abstain from their "virtually unflagging" duty to exercise their jurisdiction, *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976), was whether there was an ongoing tribal proceeding.

To require abstention absent an ongoing proceeding would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case. . . . " *New Orleans Public Service*, 491 U.S. at 368. See, also, *id.*, at 358-359 ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given;" and "the right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." (citations omitted)). Indeed, to require abstention absent an ongoing tribal proceeding "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (citations omitted). Abstention in this context would place a plaintiff "between the Scylla of intentionally flouting [tribal] law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed in enforcement proceedings." *Id.* at 1229, quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

In contrast to the classic *Younger* abstention context involving deference by the federal court to ongoing state proceedings, ignoring this basic requirement of ongoing tribal proceedings here would give greater deference to

tribal proceedings than to state proceedings. The primary and most compelling factor of comity driving *Younger* is "Our Federalism." *Younger*, 401 U.S. at 44. This factor, arising from the fundamental constitutional structure, does not apply to tribes. *United States v. Kagama*, 118 U.S. 375, 379 (1886). While significant, congressional policies of tribal self-determination and self-government can not be more compelling than federalism.

Thus, to abstain in the absence of ongoing proceedings would strip from plaintiffs needing to challenge abuses of power by governmental officials the remedy provided by Congress in the Declaratory Judgment Act. 28 U.S.C. 2201, et seq.. Congress enacted this remedy specifically to mesh with the doctrine first enunciated in *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), creating an exception to the doctrine of sovereign immunity and allowing a plaintiff to name a governmental official acting in excess of lawful powers as a defendant. *Steffel v. Thompson*, 415 U.S. 452, 463-467 (1974). The Petitioners have employed this very remedy here.

Without timely intervention by this Court, then, to clarify that the tribal abstention doctrine does not apply in the absence of ongoing tribal proceedings, tribal forums will be given greater deference than that afforded states. Moreover, unless this court intervenes, plaintiffs wishing to invoke their federal statutory right under the Declaratory Judgment Act to challenge tribal governmental abuses of power without actually violating the tribal ordinance will be stripped of this right.

II. This Case Provides an Opportunity for this Court to Apply the Principles of its Prior Decisions in *Montana, Brendale,* and *Bourland* to Define the Proper Role of the Federal Courts in Adjudicating Controversies Where a Tribal Government Attempts to Unlawfully Assert its Authority over Nonmember Activity on Fee Land Which This Trilogy of Cases Holds Is Free From Tribal Regulation.

The tribal abstention doctrine was never meant to cloak from scrutiny assertions of power clearly in excess of limits established by the Constitution, Acts of Congress and this Court. *National Farmers Union*, 471 U.S. at 856, n. 21; *Iowa Mutual*, 480 U.S. at 19, n. 12. The incorporation of tribes into the United States and their loss of the power to exclude nonmembers as the result of Acts of Congress forever altered the "platonic notions" of tribal sovereignty. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S.Ct. 683, 687 (1992). While the form may remain, the substance now consists only of those powers not inconsistent with their dependent status. The Court indicated this left tribes "very narrow powers" over non-Indians. *Id.* at 692. Thus, where plaintiffs can make a prima facie showing that there is neither a textual basis in a treaty or statute nor any other demonstrated basis for a tribal government to assert its jurisdiction over particular nonmember activity, the federal court should exercise its jurisdiction.

In a trilogy of cases, *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989); and *South Dakota v. Bourland*, ___ U.S. ___ (1993), this Court has established and emphasized that tribes generally lack inherent

authority to regulate nonconsensual activity by nonmembers on their own fee land. However, recent decisions of the Ninth and other Circuits, see, *Stockwest Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (en banc reversal of 942 F.2d 655 (1991)); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, ___ F. 3d ___, 1994 W.L. 244341 (8th Cir. 1994) (petition for rehearing en banc pending), as well as the decisions below in this case, have ignored these holdings of this Court which define the narrow scope of tribal authority over nonmembers; and, instead, these lower courts have mechanically deferred to the tribal processes, both in the absence of ongoing tribal proceedings and in the absence of any demonstrated basis for the assertion of tribal authority over the nonmember activity at issue. In this case, the district court misapplied dicta in *Iowa Mutual* to hold the tribal court "presumptively" has jurisdiction here. A-13. The plurality in *Brendale*, however, rejected this dicta as "misplaced." 492 U.S. at 427, n. 10.

In *Montana*, the Court set out the general rule that tribal governments lack jurisdiction over nonmember activity on fee lands. *Montana*, 450 U.S. at 564-565. It then stated that a tribe *may* "retain inherent sovereign power" to regulate some nonmember activity on fee lands where the nonmember has entered consensual relations (not applicable here) with the tribe or the nonmember activities "so threaten the Tribe's political or economic security, as to justify tribal regulation." *Montana*, 450 U.S. at 565-566.

In *Brendale*, a clear majority of the court (6-3) held as to the nonmember fee land in the "open" area of the

Yakima Reservation that the Yakima Tribe lacked jurisdiction to enforce its zoning ordinance. (The Petitioners' land here is indisputably in the "open" area of the Reservation.)

Relying upon its earlier decisions in *Montana* and *Brendale*, this Court left no doubt in *Bourland* that Tribes do not possess inherent sovereign authority over nonmember activity on fee land, regardless of whether the activity is hunting and fishing or some other land use, and regardless of whether the land is owned by nonmembers or some other non-tribal entity. *South Dakota v. Bourland*, 113 S.Ct. 2309. ("[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress broadly opened up such land to non-Indians the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Id.* at 2318.) The Court emphasized in *Bourland* that when Congress opened reservation lands to nonmembers for entry and acquisition, "[t]hese statutes *clearly* abrogated the Tribe's 'absolute and undisturbed use and occupation' of these tribal lands . . . and thereby deprived the Tribe of the power to license non-Indian use of the lands." *Id.* at 2321. (Emphasis added.)

In "broadly opening up (reservation lands) Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.*, at 2318. Further emphasizing the point, the Court stated, "[T]he reality . . . after *Montana* [is that] tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S., at 564, and is therefore not inherent." *Id.*, at 2320, n. 15. Finally, the

Court clarified that its earlier holdings have broad applicability and may not be distinguished under the guise of examining individual statutes and agreements as they apply to individual tribes or reservations.[15]

Thus, when Congress has by statute opened reservation land to nonmember entry and acquisition, there is no basis, either in a treaty or in a tribe's inherent sovereignty, for the lawful exercise of jurisdiction over nonmember land use. *Bourland* erased any doubts that may have lingered after *Montana* and *Brendale* that a tribe's inherent sovereign authority over nonmember activity on fee land could survive Congress' opening of a reservation and the alienation of land to nonmembers.

In this case, the undisputed facts demonstrate Congress abrogated any authority the CSKT government may have once had over the land in question. Congress opened the Flathead Reservation to settlement under the general homestead, mineral and townsite laws of the United States. Congress granted some of these lands, the school trust lands, to the State of Montana. Congress authorized the creation of an irrigation project and the transfer of the operation and management authority of the Project to the landowners it serves.

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[15] In this respect, *Bourland* adopted on behalf of seven members of the Court the implied rationale of the plurality in *Brendale* when it simply stated that a "tribe's inherent sovereignty is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations,' " and therefore there was no need to examine the effect of specific Treaties or statutes. *Brendale*, 492 U.S. at 425-426 and n. 9.

Later, Congress specifically authorized the formation of irrigation districts under state law to represent these landowners.[16]

As this Court held in *Montana*, in *Brendale* and most recently in *Bourland*, these statutes "clearly abrogated", *Bourland, supra* at 2321, the CSKT government's power to regulate nonmember land use. It cannot claim to possess either inherent sovereign authority or treaty-based authority to regulate nonmember land use. The only possible basis remaining for tribal jurisdiction is the "second *Montana* exception." This mere possibility, however, should not, in the absence of ongoing proceedings, require abstention, particularly since the activity at issue – farming and ranching – is precisely the activity Congress intended nonmembers to undertake on their land free from tribal control. Thus, contrary to a case where a truly exceptional circumstance has arisen, this activity is not exceptional and cannot fall within a tribe's "very narrow" powers. *County of Yakima, supra,* 112 S.Ct. at 692.[17] The basis of tribal authority under this exception, however, has no textual source in either treaty or federal statute.

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[16] See n. 3, *supra.*

[17] Finding that tribal jurisdiction, rather than a federal cause of action, arises out of exceptional circumstances conflicts with the logical foundations of the Court's decisions, particularly in *Brendale* and *Bourland*. Once Congress abrogates tribal sovereignty over an area, the simple fact is that it is gone. To allow tribal sovereignty to be resurrected in exceptional circumstances is extraordinary and should be severely limited. *Brendale,* 492 U.S. at 430 (plurality opinion).

To allow tribal authority over nonmembers where there is no textual basis for the assertion of that authority should require a very strong showing that exceptional circumstances exist. Where there is neither a textual basis for nor any truly exceptional circumstances to legitimize the assertion of tribal jurisdiction, the federal court should exercise its jurisdiction and not defer to tribal processes.

Proceeding from these principles, it is axiomatic that if the tribal government has neither such sovereign power nor treaty-based authority, neither the tribe nor the federal court has any basis to require nonmembers either to exhaust tribal administrative remedies or to plead their case in tribal court before gaining access to a federal forum. Yet, this is precisely what the district court below and the appellate court in its summary affirmance of the district court's opinion without explanation or explication would require. This case, then, provides the Court with an opportunity to apply the principles of *Montana*, *Brendale*, and *Bourland* to define the proper role of the federal courts in exercising their jurisdiction where a tribal government attempts to unlawfully assert its authority over nonmember activity of the type involved here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated this 5th day of July, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN FLATHEAD JOINT BOARD OF CONTROL,

Plaintiffs,

-v-

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan, Jr., et al.,

Defendants.

CV 91-155-M-CCL

OPINION AND ORDER

(Filed Feb. 12, 1993)

* * *

The Joint Board of Control (JBC) and two individuals have filed this action against the officials of the Department of Interior and individual officials of the Confederated Salish and Kootenai Tribes (Tribes) alleging that the Tribes have no authority to exercise regulatory jurisdiction over activities of non-members on the Flathead Reservation on "fee" lands. Plaintiffs seek declaratory and injunctive relief barring the Tribal government from applying Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance (ALCO), against the Plaintiffs anywhere and under any circumstances. Plaintiffs are also suing the United States for its role in approving ALCO

and for allegedly providing funding to develop, implement and enforce the Ordinance. Against the Federal Defendants, Plaintiffs seek relief in the nature of mandamus requiring the disapproval of the Ordinance as it applies to nonmember activity.

Tribal Defendants and Federal Defendants have each moved to dismiss the action. Tribal Defendants argue that the court lacks personal jurisdiction over the Tribal governmental officials named in the suit because of the Tribes' sovereign immunity; that Plaintiffs lack standing and capacity to sue; and that Plaintiffs have failed to exhaust Tribal remedies.

The Federal Defendants move to dismiss on the grounds that the Tribes are a necessary and indispensable party to this action and that the actions of the Federal Defendants are protected by sovereign immunity. Federal Defendants also assert that Tribal remedies have not been exhausted.

FACTUAL BACKGROUND

ALCO is a civil regulatory ordinance designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat. The Tribal Council approved ALCO on December 13, 1985. The Secretary of Interior approved ALCO in accordance with the provisions of the Tribal Constitution on December 20, 1985. The Tribes proposed regulations to implement ALCO and published legal notice of the proposed regulations for public comment. The regulations were adopted pursuant to the Tribal Administrative Procedures Ordinance after a comment period. Neither the JBC nor the individual

Plaintiffs sought to challenge the regulations during this notice and comment period.

Plaintiff Ross Middlemist is an irrigator served by the Flathead Irrigation and Power Project (FIPP) and is a constituent and member of the Joint Board of Control. His property lies within the exterior boundaries of the Reservation. Mr. Middlemist intended to engage in a project to improve a natural spring site on his property which he uses to supply a stockwater tank. On September 17, 1991, Middlemist went to the Agricultural Stabilization and Conservation Service (ASCS) in Sanders County and applied for funding for his project which was approved in the amount of $1,050. In October of 1991, Middlemist was informed by the ASCS that in addition to applying for permits for the project from the Army Corps of Engineers and the Montana Department of Fish, Wildlife, and Parks, he would have to apply for a permit from the Tribal Shoreline Protection Office pursuant to the terms of ALCO. Middlemist never applied for such a permit and, therefore, has never paid a filing fee nor been rejected by the Tribal agency. He has not done any construction on his improvement project.

Plaintiff Wayne Maughan also holds fee simple title to property within the exterior boundaries of the Reservation. He is also an irrigator served by FIPP and represented by the JBC. Mr. Maughan has an impoundment reservoir on his property which is fed by Maughan Creek. The dam on Maughan's property requires improvement for safety, water quality reasons, and to expand the capacity of the reservoir.

In their complaint, Plaintiffs allege that the improvement of this dam will improve the quality of the water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows. Additionally, it is believed that the improvement project will result in more water available for upstream irrigators by requiring less to be delivered to Maughan.

To facilitate this project, the JBC passed a resolution on November 13, 1990 and set aside a grant of $3,000 to help pay for the project asserting that the project will benefit the JBC and its constituents. The JBC retained an engineering firm to design and draft plans for the improvement of the dam. Plaintiffs Maughan and the JBC then began the process of applying for state and federal permits and approvals. They did not apply for a permit from the Tribal Shoreline Protection Office, paid no fees, and were not denied a permit by that agency.

Plaintiffs generally assert that the Tribes do not have authority over non-members and that the exercise of Tribal jurisdiction over them is violative of their constitutional rights. Plaintiffs list these rights as the right to vote and hold office in the government under which they live; the right to sit on a jury; the right to be judged by a jury of their peers; and the right to a jury trial in a civil matter.

DISCUSSION: EXHAUSTION OF TRIBAL REMEDIES

Though Defendants have stated various grounds in support of their motions to dismiss, the court finds that the issue of exhaustion of tribal remedies is dispositive of this action in its present posture.

It is well settled that the question of whether an Indian tribe retains the sovereign power to compel a non-Indian property owner to submit to the civil jurisdiction of the tribe gives rise to a federal question. The issue here is whether, in these circumstances, this court must defer exercising jurisdiction until such time as the Tribes' administrative and judicial forums have been exhausted.

In *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit Court of Appeals stated:

> The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: "[E]xhaustion *is required* before such a claim may be entertained by a federal court." *National Farmers Union*, 471 U.S. at 857, 105 S.Ct. at 2454. In *Iowa Mutual Ins. v. LaPlante*, the Supreme Court said that "federal policy . . . directs a federal court to stay its hand," and "proper respect . . . requires" tribal remedy exhaustion. 480 U.S. at 16, 107 S.Ct. at 976. Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." *Id.* The LaPlante Court emphasized that "*National Farmers Union requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance." *Id.*

BN v. Crow Tribe, 940 F.2d at 1245 (emphasis in original).

However, before deferring to a tribal forum, "a federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement." *Stock West Corp. v. Taylor*, 942 F.2d 655. (9th Cir. 1991). These purposes, as set forth in *National Farmers Union*

Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), include the development of tribal self-government, practical considerations of judicial efficiency, and the benefits of tribal expertise and explanations.

Federal Law and Ongoing Proceedings

Plaintiffs initially argue that exhaustion is not applicable in this case because the asserted claims only raise issues of federal law and because there is no ongoing tribal proceeding involved. Exhaustion, however, cannot be avoided for either of these reasons.

Any dispute concerning the extent of tribal sovereignty and authority will involve questions of federal law. The Supreme Court recognized this fact in *National Farmers Union* when it stated that the determination of "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union*, 471 U.S. at 855-856. Even though these sovereignty issues involve federal law, the Court decided that such an examination "should be conducted in the first instance in the Tribal Court itself." *Id.* Therefore, the fact that the jurisdictional question falls under federal law and raises constitutional concerns does not defeat the exhaustion requirement.

Furthermore, the lack of an ongoing proceeding in a tribal forum does not negate the exhaustion requirement.

In *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), it was held that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.* at 1407.

The court recognizes that in *Burlington Northern v. Blackfeet Tribe*, 942 F.2d 899 (9th Cir. 1991), the Circuit Court did not require exhaustion because the case presented issues of federal law and no proceeding was pending in tribal court. However, this particular holding has been called an anomaly by the Circuit Court itself in a subsequent case. *Stock West*, 942 F.2d at 633, note 7. Additionally, the clear statement in *Crawford* concerning pending proceedings raises serious questions concerning the validity of *BN v. Blackfeet Tribe* on the exhaustion issue. Therefore, in light of the Circuit Court's clear pronouncement on this issue in *Crawford*, the court finds that the lack of a tribal proceeding does not negate the exhaustion requirement.

Similarly, Plaintiffs rely on the holding of *Stock West* to support their contention that the lack of an ongoing tribal proceeding nullifies the exhaustion requirement. Plaintiffs' reliance on this case, however, is misplaced. The court in *Stock West* held that when an issue in dispute is a "reservation affair" or arises on the reservation, "the federal court has no option but to defer." *Stock West*, 942 F.2d at 661. In reaching its conclusion that the dispute in Stock West was not a "reservation affair," the court pointed to the lack of an ongoing tribal proceeding and the lack of issues related to tribal law. Therefore, the court merely viewed these facts as indicative of a non-reservation affair.

In this case, Plaintiffs have alleged that the subject waters and lands at issue are situated within the exterior boundaries of the Flathead Indian Reservation. Additionally, Plaintiffs are suing Tribal officials and seek to invalidate a Tribal ordinance. Unquestionably, this case is a "reservation affair" which triggers the mandatory exhaustion requirement. *Stock West*, 942 F.2d at 661; *Crawford*, 947 F.2d at 1408.

Policy Imperatives

Even if the dispute here constitutes a "reservation affair," Plaintiffs contend that exhaustion should not be required because none of the purposes for exhaustion set forth in *National Farmers Union* would be advanced in this case. Plaintiffs' contention, however, is not supported by the law or the facts.

In *National Farmers Union*, the Court stated that the first of the three policy imperatives behind exhaustion was based on the Congressional commitment "to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the legal and factual bases for the challenge." *National Farmers Union*, 471 U.S. at 856. Additionally, the court stated:

> Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has

> allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 856-857.

In *BN v. Crow Tribe*, which is controlling in this case, the Circuit Court addressed the *National Farmers Union* imperatives in the context of a case strikingly similar to the one at bar. In *BN v. Crow Tribe*, the plaintiffs filed suit in federal court seeking a declaratory judgment against tribal officials to invalidate a tribal civil regulatory ordinance as exceeding the Tribes' jurisdiction. In determining that the imperative of tribal self-government would be advanced by exhaustion, the court stated:

> The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. The ordinance establishes governmental mechanisms for exercise of that authority. Moreover, the ordinance identifies railroad services as vital to the Tribe's economic development.

BN v. Crow Tribe, 940 F.2d at 1245.

In this case, the Confederated Tribes have asserted their commitment to sovereign authority over Reservation affairs through Ordinance 87A which establishes governmental mechanisms for the protection of aquatic habitat on the Reservation. As in *BN v. Crow Tribe*, the challenged ordinance seems to be important to the well-being of the Tribes and their members for both health and economic reasons.

The policy imperatives concerning judicial efficiency and tribal expertise would also be advanced in this case through exhaustion. As in *BN v. Crow Tribe*, the Tribes are "in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record the federal district court . . . [faces] an action based on an uninterpreted tribal ordinance and an obscure factual background." *BN v. Crow Tribe*, 940 F.2d at 1246. Furthermore, exhaustion will provide the benefits of tribal explanations and expertise to the court in the event of further judicial review. *Id.*

Plaintiffs raise two arguments regarding the purposes of exhaustion which must be addressed. First, Plaintiffs maintain that this case involves only issues of federal law and that no tribal expertise is required. This argument, however, is unavailing for two reasons. First, though Plaintiffs contend that they are susceptible to Tribal regulatory authority, the initial question as to whether the Plaintiffs' proposed projects are within the scope of Ordinance 87A has not been answered. Certainly, the Shoreline Protection Office is best suited to make this determination in the first instance. Second, the fact that issues of federal law are involved does not

diminish the benefits of exhaustion. The growing expertise of tribal courts need not be limited solely to the interpretation of internal laws and regulations. To the contrary, the continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts. Though exhaustion provides benefits to later reviewing courts, it also benefits tribal courts by encouraging them "to explain to the parties the precise basis for accepting jurisdiction." *National Farmers Union*, 471 U.S. at 857.

The second point raised by Plaintiffs concerning the purposes of exhaustion is based on prior administrative actions taken by the Tribes pursuant to Ordinance 87A. Because the Ordinance has been in effect for several years and has already been interpreted by the Shoreline Protection Board as a grant of authority over all lands within the exterior boundaries of the Reservation regardless of ownership, Plaintiffs suggest that exhaustion is unnecessary, and that this previous interpretation distinguishes this case from *BN v. Crow Tribe*.

In *BN v. Crow Tribe*, the Circuit Court noted that the Crow Tribe had not had an occasion to interpret the ordinance in question before the suit was filed in federal court. In this case, Ordinance 87A has been interpreted previously but only by the Shoreline Protection Board. The scope of Ordinance 87A has not been previously considered by the Tribal Court. Because both administrative and judicial remedies must be exhausted before proceeding in federal court, Plaintiffs' argument concerning prior administrative interpretation is unavailing. *BN v. Crow Tribe*, 940 F.2d at 1247.

Based on the foregoing, the court finds that all three imperatives for exhaustion compel dismissing or staying federal proceedings in this case.

National Farmers Union Exceptions

In *National Farmers Union*, the Supreme Court enumerated three exceptions to the tribal exhaustion doctrine. Exhaustion is not required in situations where the assertion of tribal jurisdiction (1) "is motivated by a desire to harass or is conducted in bad faith," or (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. at 856, note 21. Plaintiffs argue that the latter two exceptions are applicable in this case.

Regarding the second exception, the court notes that Plaintiffs have expanded it to include actions which are patently violative *of the Constitution or* express jurisdictional prohibitions. By improperly adding the constitutional aspect to the exception, Plaintiffs attempt to engage the court in an analysis of their constitutional claims at the exhaustion stage. However, the court will not consider the merits of Plaintiffs' case at this stage of the proceedings.

As to the genuine exception, Plaintiffs cannot point to any action "patently violative of jurisdictional prohibitions." As was discussed above, this dispute is unquestionably a "reservation affair" and arises on the reservation. The Supreme Court has held that "tribal authority over the activities of nonIndians on reservation

lands is an important part of tribal sovereignty. (Citations omitted) Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. Rather than patently violative of jurisdictional prohibitions, Tribal jurisdiction over Plaintiffs in this case "presumptively" lies with the Tribes pending a full examination of tribal sovereignty. Therefore, the second exception to the exhaustion requirement does not apply in this case.

Plaintiffs also contend that exhaustion would be futile because of a lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. Plaintiffs' arguments in this regard include allegations that the Shoreline Protection Board and the Tribal Court have prejudged the issue, that they lack independence from the Tribal Council and the Tribal Legal Department, and that they are biased. However, arguments questioning the competency and neutrality of tribal courts have long been a mainstay in attacks on tribal jurisdiction by nonIndians and have been consistently rejected. *See, e.g. Iowa Mutual*, 480 U.S. 9 (1987); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Therefore, the court finds that the third exception to the exhaustion requirement also does not apply in this case.

Presence of Federal Defendants

Finally, Plaintiffs argue that exhaustion of tribal remedies is impossible in this case because the Tribal Court lacks jurisdiction over the Federal Defendants. Plaintiffs contend they cannot comply with the exhaustion requirement because they cannot file the identical

case in Tribal Court. Plaintiffs, however, have misconstrued the exhaustion requirement.

An order dismissing this action until the exhaustion requirement has been fulfilled is not a remand of the case to Tribal Court. This court cannot compel Plaintiffs to seek relief in Tribal Court but can only act according to the clear directives that have been given it by the United States Supreme Court and the Ninth Circuit Court of Appeals. Pursuant to those directives as enunciated in *National Farmers Union* and its progeny, Plaintiffs can proceed no further with this case in federal court until tribal remedies have been exhausted.

Compliance with the exhaustion requirement, however, does not demand the impossible of Plaintiffs as they suggest. Plaintiffs are not required to file a case in Tribal Court which includes the Federal Defendants. Plaintiffs may seek such relief in Tribal Court as is possible under the law and, once that is accomplished, may seek further relief in this court.

The issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action and could be presented in Tribal Court without the Federal Defendants. The exhaustion doctrine requires that a record be developed in tribal proceedings concerning the authority of the Tribal Council to promulgate and enforce Ordinance 87A. That issue is determinative of all of Plaintiffs' claims, including the correctness of the BIA's approval and subsequent funding of the Ordinance. Therefore, the necessary record could be developed in Tribal Court without the presence of the Federal Defendants.

CONCLUSION

Because this case arises on the Reservation, directly implicates Tribal governmental interests, and names Tribal officials as Defendants, it is a "reservation affair." Under such circumstances, tribal remedies must be exhausted prior to the exercise of federal jurisdiction unless the assertion of tribal jurisdiction falls within one of the *National Farmers Union* exceptions. *Crawford v. Genuine Parts*, 947 F.2d at 1408. As none of the exceptions apply in this case, the court must either dismiss the case or stay the proceedings pending exhaustion of tribal remedies. *Id.* at 1407. Therefore,

IT IS HEREBY ORDERED that Defendants' motions to dismiss for failure to exhaust tribal remedies are GRANTED. The case is DISMISSED without prejudice pending exhaustion of tribal remedies.

If Plaintiffs do not inform the court within sixty days of their intent to seek Tribal remedies, the court shall enter final judgment.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 11th day of February, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

Ross MIDDLEMIST, Wayne W. Maughan, and Flathead Joint Board of Control,
petitioners, v. Bruce BABBITT, Secretary of Interior, et al.
No. 92-1757.
June 7, 1993. The petition for a writ of certiorari before judgment is denied.

Ross MIDDLEMIST, Wayne W. Maughan, Flathead Joint Board of Control, Plaintiffs-Appellants,
v.
Secretary of the Interior, Bruce BABBITT; Director of the Bureau of Indian
Affairs, Portland Area, Stanley M. Speaks; Members of the Tribal Council of
the Confederated Salish and Kootenai Tribes, Michael Pablo, Sonny Morigeau,
Louis Adams, Hank Baylor, et al., Defendant-Appellees.
No. 93-35315.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 7, 1994.
Decided April 6, 1994.

ORDER

We affirm the district court on the basis of its well-reasoned published opinion, Middlemist v. Secretary of United States Department of Interior, 824 F.Supp. 940 (D.Mont.1993).

AFFIRMED.

UNITED STATES DISTRICT COURT

MISSOULA DIVISION DISTRICT OF MONTANA

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

V.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manual Lujan, Jr., et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 91-155-M-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss for failure to exhaust tribal remedies having been granted, that plaintiff take nothing and the case is dismissed without prejudice pending exhaustion of tribal remedies.

March 11, 1993
Date

LOU ALEKSICH, JR.
Clerk

/s/ Barbara A. Fries
(By) Deputy Clerk

Jon Metropoulos
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 North Last Chance Gulch
Post Office Box 1697
Helena, MT 59624
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan Jr.; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louie Adams, Hank Baylor, Tony Incashola,

Cause No. CV-91-155-M-CCL

COMPLAINT

(Filed NOV 6 1991)

John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Snyder, Jim Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Joseph Felsman,

Defendants.

INTRODUCTION

1. In this action, the Plaintiffs seek relief from the imposition of power by the government of the Confederated Salish and Kootenai Tribes in excess of its jurisdiction and in violation of the Plaintiffs' constitutional rights; and from the unconstitutional and illegal support and approval of such violations by officers and employees of the United States. The Plaintiffs are not tribal members. They have no right to vote in tribal elections, hold tribal office, sit on juries in tribal court, or act as a tribal judge. The U.S. Constitution guarantees Plaintiffs these and other rights, including full and equal participation in the government that regulates their activities and in the courts that enforce the laws under which

they live. The individual Plaintiffs own land in fee within the Flathead Reservation, and with the Joint Board of Control they wish to undertake work on that land. Tribal government asserts it has jurisdiction to regulate that work pursuant to tribal Ordinance 87A. The assertion of jurisdiction by the tribal government over these Plaintiffs and the approval and support of this illegal assertion by federal officers and employees violates the Plaintiffs' constitutional rights. Moreover, the assertion of authority by the tribal government over these Plaintiffs exceeds its jurisdiction and is, therefore, illegal and illegitimate.

JURISDICTION

2. This is a civil action for declaratory, injunctive and mandatory relief arising under the Constitution of the United States and the Treaty of Hellgate, entered July 16, 1855 by the United States and representatives of the tribes which now comprise the Confederated Salish and Kootenai Tribes. This Court has jurisdiction pursuant to 28 USC § 1331 and 28 USC § 1361. This court has authority to review the federal administrative actions at issue pursuant to 5 USC § 702. It has authority to grant the requested declaratory, injunctive and mandatory relief pursuant to 28 USC § 2201 and 5 USC § 706.

VENUE

3. Venue is appropriate in the United States District Court of Montana, Missoula Division, pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Ross Middlemist is a rancher who owns 110 acres in fee in Sanders County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Confederated Salish and Kootenai Tribes (hereinafter "Tribes" or "CSKT.")

5. Plaintiff Middlemist is an irrigator served by the Flathead Irrigation and Power Project (hereinafter "FIPP"), and he is a constituent of the Joint Board of Control. Mr. Middlemist is also a Commissioner for the Jocko Irrigation District and a member of the Joint Board of Control.

6. Plaintiff Wayne W. Maughan is a farmer who owns 280 acres in fee in Lake County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Tribes.

7. Plaintiff Maughan is a constituent of the Joint Board of Control.

8. Plaintiff Flathead Joint Board of Control (hereinafter "JBC" or "Joint Board") is comprised of elected representatives of three Irrigation Districts, the Flathead, Mission, and Jocko Valley, served by the FIPP. The JBC was created pursuant to § 85-7-1601, Mont. Code Ann., et seq. Pursuant to § 85-7-1612, Mont. Code Ann., the JBC has the authority and power, *inter alia*, to institute and maintain any and all actions, including suits at law or in equity, to enforce, maintain, protect, or preserve any and all rights, privileges and immunities enjoyed by the Irrigation Districts and their respective members.

9. The federal Defendants are the Secretary of the United States Department of Interior, the Portland Area Director of the Bureau of Indian Affairs, and the Superintendent of the BIA Flathead Agency. These Defendants, or their predecessors, reviewed and approved tribal Ordinance 87A, or had the responsibility to do so, and continue to lend or facilitate financial and technical assistance for its implementation and enforcement. Hereafter, when mentioned separately from the remaining Defendants, these Defendants are denominated the "federal government Defendants".

10. The remaining Defendants are elected or appointed officials of tribal government or employees of tribal government responsible for adopting, implementing and enforcing tribal Ordinance 87A. Specifically, the elected officials are members of the Tribal Council of the CSKT, which adopted tribal Ordinance 87A. The named tribal government employees or appointees are members of the tribal Shoreline Protection Board, the administrator of the Shoreline Protection Office of the CSKT, and the Director of the tribal Department of Natural Resources, all of whom are charged with implementing and enforcing the Ordinance. Hereafter, when mentioned separately from the federal government Defendants, these Defendants are denominated the "tribal government Defendants".

FACTS

Ross Middlemist

11. Plaintiff Ross Middlemist represents the third generation in his family to farm and ranch on the

Flathead Reservation. He purchased the particular real property where the activities in question are to occur in 1974. The property is homesteaded land in the Dixon Bench area and it is included within the Jocko Irrigation District. It is in Sec. 13 and 14, T. 18 N., R. 22 W.

12. A small natural spring arises from the ground on the property, which Mr. Middlemist holds in fee. This spring runs for approximately 100 yards and disappears into the ground on Mr. Middlemist's property. Mr. Middlemist uses this spring water to supply a stockwater tank. This stockwater tank has become worn over the years and is in need of refurbishing or replacement.

13. Mr. Middlemist planned to improve the site and replace or refurbish the stockwater tank this fall. On September 17, 1991 he went to the Agricultural Stabilization Conservation Service ("ASCS") for Sanders County in Plains, Montana, to ask about financial assistance for this project. After an inspection by a Soil Conservation Service ("SCS") employee, he was told the project would likely qualify for funding.

14. On September 28, 1991 Mr. Middlemist received a letter from the ASCS which stated the project had been approved for funding in the amount of $1,000.00.

15. On October 8 and 9, Mr. Middlemist was informed by the SCS and the ASCS that, in addition to applying for permits for the project from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks, he would have to apply for a permit from the tribal Shoreline Protection Office pursuant to the provisions of tribal Ordinance 87A.

16. Mr. Middlemist stated that while he would apply for all applicable permits, he did not believe tribal Ordinance 87A was legally applicable to him. He was then informed by the ASCS this might impede approval of the project for funding.

17. On October 24, 1991, Mr. Middlemist was informed the ASCS would not provide funding for the project unless he obtained a tribal permit pursuant to Ordinance 87A. He was told the $1,000.00 funding would remain available to him for 30 days, allowing him to decide whether or not to apply for a tribal 87A permit.

18. Mr. Middlemist has not applied for a permit from the tribal Shoreline Protection Office.

19. Mr. Middlemist has done no construction on the project.

Wayne W. Maughan and Joint Board of Control

20. Plaintiff Wayne Maughan holds fee simple title to real property located in the NW 1/4 of Sec. 16, T. 20 N., R. 21 W., which is included within the Mission Irrigation District. He is a second-generation farmer in the area. His family first acquired the property in question by purchase from the State of Montana through a school section sale.

21. Mr. Maughan is an irrigator served by FIPP and represented by the Joint Board of Control.

22. Mr. Maughan has an impoundment reservoir on his property which is fed by a perennial stream, Maughan Creek, and which, along with the creek, drains farmland situated at higher elevations. The stream runs in a generally east-to-west direction.

23. The dam on Mr. Maughan's property requires improvement for safety and water quality reasons and to expand the capacity of the reservoir.

24. Improvement of this dam will improve the quality of water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows; and by allowing reuse of irrigation water. Additionally, by capturing more runoff and irrigation return flows and the reuse of that water, it will make more water available for upstream irrigators by requiring less water to be delivered to Mr. Maughan.

25. To facilitate this project, the Joint Board passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside a grant of $3,000.00 to help pay for the project.

26. This project will benefit the Joint Board and its constituents by improving water quality and the efficiency of water use and by enhancing irrigation capabilities and opportunities.

27. This project is part of a demonstration program for projects providing both water quality and irrigation benefits. Similar projects are anticipated on the lands of Joint Board constituents, including non-member-owned fee lands, to enhance irrigation opportunities, promote the efficient use of water, and improve water quality.

28. The Joint Board retained an engineering firm to inspect the dam and design and draft plans for its improvement. In the course of that work, the engineer

inspected the dam and consulted on the plans for improving the dam with the Montana State Department of Natural Resources and Conservation ("DNRC"), Dam Safety Section. The DNRC determined the dam is not a high-hazard dam and therefore the Joint Board and Mr. Maughan need not obtain either a construction or operating permit from DNRC.

29. Mr. Maughan and the Joint Board then began the process of applying for the requisite state, federal and local government permits and approvals. Specifically, the Joint Board and Mr. Maughan have begun the process of applying for or intend to apply for, when appropriate, the following permits:

(i) a "404 permit" from the Army Corps of Engineers;

(ii) a Montana Pollutant Discharge Elimination System ("MPDES") permit from the state Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES");

(iii) a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife & Parks;

(iv) a "310", Natural Streambed and Land Preservation Act permit from the Lake County Soil Conservation District;

(v) a "3A" permit related to a short-term turbidity variance during construction, from the DHES;

(vi) a flood plain development permit from the DNRC.

30. The Army Corp of Engineers informed the Joint Board of Control the tribal Shoreline Protection Office, pursuant to tribal Ordinance 87A, would have to review the project.

31. Neither the Joint Board nor Mr. Maughan have applied for a permit from the tribal Shoreline Protection Office.

32. Neither the Joint Board nor Mr. Maughan have done any construction on the project.

Tribal Ordinance 87A

33. The Aquatic Lands Conservation Ordinance ("ALCO"), designated tribal Ordinance No. 87A, was adopted by the Tribal Council on December 13, 1985. By its terms, it became effective upon the promulgation of implementing regulations by the Tribal Council on December 5, 1986.

34. By its terms, Ordinance 87A purportedly applies throughout the Flathead Indian Reservation regardless of whether the person who intends to engage in a project within the definition of ALCO is a tribal member or not, or whether or not the project is to be carried out on land owned in fee by a nonmember.

35. The federal government defendants or their agents or employees, or some of them, provided technical and financial assistance to the tribal government defendants for the development of Ordinance 87A.

36. The federal government defendants or their agents or employees, or some of them, provide technical

and financial assistance to tribal government for the implementation and enforcement of Ordinance 87A.

37. The Secretary of the Interior, or a subordinate to whom he delegated the authority, approved Ordinance 87A.

38. The Shoreline Protection Office ("SPO"), which administers and enforces Ordinance 87A, is part of tribal government. It is an office within the tribal government's Department of Natural Resources.

39. J. Lloyd Jackson is the administrator of the SPO.

40. Rhonda R. Swaney is the Director of the Department of Natural Resources.

41. The SPO has advertised by radio and newspaper that Ordinance 87A is applicable throughout the reservation and anyone planning to do any work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation must adhere to its provisions.

42. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO prior to doing any work on the project.

43. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO for a determination of whether or not the planned project falls within the scope of its provisions.

44. Ordinance 87A requires each applicant to pay a nonrefundable fee.

45. Tribal government, through the SPO and the Shoreline Protection Board, enforces Ordinance 87A and would enforce its provisions against the Plaintiffs if they proceed with their projects without following the requirements of Ordinance 87A.

46. Ordinance 87A provides that any person engaging in a project without a valid 87A permit shall be subject to proceedings in tribal court for abatement and a penalty of up to $500.00 for each day the project is deemed in violation. The tribal court, pursuant to 87A, may also order a violator "to restore at his own expense the damaged lands and waters. . . ."

The Flathead Reservation

47. The Treaty of Hellgate signed July 16, 1855 by representatives of the United States and the Flathead Nation, the Upper Pend d'Oreilles, and the Kootenais provided for the reservation to these Indian Tribes of the land now within the exterior boundaries of the Flathead Indian Reservation.

48. The Reservation encompasses approximately 1.2 million acres of land in northwest Montana. Approximately 50% of the Reservation area is owned by individuals in fee. Of this amount, the majority is owned by individuals who are not members of the CSKT.

49. Of the remaining Reservation acreage, the federal government owns approximately 22,000 acres; and the State of Montana owns approximately 30,000 acres.

50. The remainder of the Reservation is either held in trust by the United States for the Tribes or individual tribal members or owned by the Tribes.

51. The majority of tribal and trust lands is situated along the periphery of the Reservation and along the Flathead River corridor. The valleys of the Reservation are largely owned in fee by nonmembers of the Tribes.

52. Article two of the Treaty of Hellgate provided that the Reservation was to be "for the use and occupation" of the Tribes "and as a general Indian reservation . . . " Article two also provided the reservation was to be "for the exclusive use and benefit" of the Tribes, and that no "white man, excepting those in the employment of the Indian Department (shall) be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

53. Article six provided that the President may in his discretion cause the whole or a portion of the reservation to be surveyed and allotted to individuals or families of the Tribes, citing as providing the terms and regulations for the location of individuals or families on allotments the sixth article of the treaty with the Omahas.

54. In Article eight of the Treaty, the Tribes acknowledged "their dependence upon the Government of the United States. . . . "

55. Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 USC §§ 331 et seq., in 1887, the policy of which was to effect the gradual assimilation of

the Indian population and the gradual extinction of Indian reservations and Indian titles.

56. Toward this end, Congress provided in the General Allotment Act for the allotment of reservation lands to tribal members, the eventual removal of restrictions on alienation of such allotments, and the opening of unallotted reservation lands to non-members for settlement.

57. Pursuant to this policy, Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the survey and allotment of the Flathead Reservation to persons having tribal rights and the subsequent disposal of unallotted lands to nonmembers pursuant to the requirements of the Act.

58. Pursuant to these Acts of Congress and Presidential Proclamations issued under their provisions and through alienation of lands allotted to tribal members, nonmembers of the Tribes have come to own the majority of fee land on the Reservation.

59. The Reservation forms a portion of three counties, those being Missoula County, Sanders County, and Lake County.

60. The entire Reservation population according to the latest U.S. census figures is 21,259. Of this amount, 3,000, or 14% are tribal members. Thus, 86% of the Reservation population is comprised of nonmembers of the Tribes.

61. Nonmembers are excluded from entering certain areas of the Reservation by tribal government.

62. Federal, state, and local governmental agencies exercise regulatory jurisdiction over various activities

and occurrences on the Reservation, including the activities in question here which the Plaintiffs wish to undertake.

63. Tribal government exercises the inherent sovereign power of the Tribes and it is not a local government deriving its authority from the sovereignty of the state or federal governments.

64. Non-members are excluded from receiving or utilizing certain services provided by tribal government.

65. In its governmental capacity, the federal government cannot exclude any nonmember from entering the Reservation.

66. In its governmental capacity, the federal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

67. In its governmental capacity, the federal government can neither prohibit nor condition the activities of the Joint Board.

68. In its governmental capacity, the tribal government cannot exclude any nonmember from entering the Reservation.

69. In its governmental capacity, the tribal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

70. In its governmental capacity, the tribal government can neither prohibit nor condition the activities of the Joint Board.

71. Nonmembers may not serve on juries in tribal court, hold elective office within tribal government, serve as a tribal judge, or vote in tribal government elections.

72. The U.S. Constitution guarantees citizens the fundamental right to vote for and have an equal voice in the election of the government under which they live. The U.S. Constitution guarantees citizens the fundamental right to run for and hold elective office in the government under which they live. The U.S. Constitution guarantees citizens the right to a jury trial by their peers in civil cases where the common law provides such right. The U.S. Constitution guarantees citizens an equal right to serve as jurors in civil cases. The U.S. Constitution requires the United States to guarantee to each state a republican form of government, the benefits of which inure to the citizens of the states. The U.S. Constitution guarantees the Plaintiffs these and other rights notwithstanding their residence within the exterior boundaries of the Flathead Reservation.

Count One

73. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

74. The assertion of authority by the tribal government Defendants pursuant to tribal Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inconsistent with the Tribes' status as a dependent sovereign incorporated within the United States and subject, in its external relations, to the Constitution.

75. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Two

76. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

77. The assertion of authority by the tribal government Defendants pursuant to Ordinance 87A over the activity of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inimical to the overriding federal interest and obligation to provide, guarantee and ensure a republican form of government.

78. The exercise of tribal government power pursuant to Ordinance 87A injures the Plaintiffs by depriving them of their right to live under a republican form of government as guaranteed by the Constitution.

Count Three

79. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

80. The assertion of authority by the tribal government defendants pursuant to Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of their sovereignty and therefore their jurisdiction as it is inimical to the overriding federal interest and obligation to provide and safeguard civil liberties and rights guaranteed by the Constitution of the United States.

81. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Four

82. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

83. The Reservation areas in which the Plaintiffs have planned projects on aquatic lands are self-contained, definable areas in which non-tribal fee lands predominate. Tribal government has no significant interest in controlling these activities, and the Tribes therefore lack jurisdiction to apply and enforce Ordinance 87A.

84. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs

by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Five

85. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

86. The Secretary of Interior and his agents have the duty to refrain from acts violating the Constitution and the rights it secures to all citizens. The Secretary of Interior and his agents have the duty, when it is within their legal powers, to prohibit, prevent, and rectify violations by the tribal government of the Constitution and the rights secured to all citizens.

87. The Secretary of Interior and his agents, having approved and reviewed and failed to disapprove or modify tribal Ordinance 87A, aided, abetted, encouraged and failed to prohibit or restrain the violation by the tribal government of constitutional rights of the Plaintiffs. By approving Ordinance 87A, the Secretary of the Interior and his agents acted illegally, unconstitutionally and, therefore, beyond the scope of their powers, since their actions approved an ordinance violative of the Plaintiffs' constitutional rights.

Count Six

88. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

89. The federal government, through the Department of Interior, Bureau of Indian Affairs, provides funding and technical assistance used in the implementation and enforcement of Ordinance 87A. The federal government, through the Department of Interior, Bureau of Indian Affairs, provided funding and technical assistance used in the development of Ordinance 87A.

90. By providing funding and technical assistance for the development, implementation and enforcement of Ordinance 87A, the Secretary of Interior and his agents acted and continue to act unconstitutionally and illegally and, therefore, beyond the scope of their powers, since their actions supported and continue to support an Ordinance violative of the Plaintiffs' constitutional rights.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this court to grant the following relief:

1. A declaratory judgment that tribal government lacks the jurisdiction to apply and enforce the provisions of tribal Ordinance 87A against the Plaintiffs.

2. A permanent injunction enjoining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs.

3. Upon motion of the Plaintiffs and after hearing set by the court, a preliminary injunction, restraining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs until this matter can be fully litigated.

4. Relief in the nature of mandamus requiring the federal government defendants to disapprove tribal Ordinance 87A insofar as it purports to apply to nonmember activity on nonmember-owned land.

5. Relief in the nature of mandamus requiring the federal government defendants to withdraw technical and financial assistance for the implementation of tribal Ordinance 87A insofar as that technical and financial assistance supports, aids and encourages the imposition of tribal government power beyond its jurisdiction and in violation of the Plaintiffs' Constitutional rights.

6. Such other relief as the court deems just and proper.

DATED this 6th day of November, 1991.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: Jon Metropoulos
Jon Metropoulos
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(406) 449-6220
Attorneys for Plaintiffs

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

* * *

PART IV

PERMITS

Section 1. Permit Required

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

* * *

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

* * *

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agenyt (as handwritten in original)] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars

for each day that the responsible person continues to engage in or maintains a nonconforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

* * *

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James H. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title_____
Bureau of Indian Affairs
Date:_____

APPROVED:
/s/ Donovan R. Boldt
SUPERINTENDENT
Received Office of
Superintendent
Dated DEC 16 1985

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

* * *

Section 1.1 Authority.

These regulations are adopted under authority of Ordinance 87A of the Confederated Salish and Kootenai Tribes, the Aquatic Lands Conservation Ordinance.

* * *

PART V

ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

* * *

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, costs, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon

application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.

* * *

The Confederated Salish and Kootenai Tribes
of the Flathead Reservation

SHORELINE PROTECTION OFFICE

Box 278
Pablo, Montana 59855
(406)675-2700
Ext. 368

Conf S+K Tribes
5/4-12/31/89
#210

NOTICE

Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation **must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.**

This regulation is in accordance with Tribal Ordinances 87A, the Aquatic Lands Conservation Ordinance and 64A (revised), the Shoreline Protection Ordinance.

These ordinances represent the effort of the Confederated Salish & Kootenai Tribes to maintain the vital link between land and water for present and future generations. The economic well-being and quality of life for everyone living on the Flathead Reservation is largely dependent upon the reservations' wealth of natural resources and how they are managed.

Applications may be acquired by calling (406) 675-2700, extension 368, or by picking one up at the Shoreline Protection Office in the Tribal Complex at Pablo.

Reservation Waters Need Your
PLEASE Keep Them Clean

PLAINTIFF'S EXHIBIT D

UNITED STATES CONSTITUTION

ARTICLE IV

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

TREATY WITH THE FLATHEADS, ETC., 1855.

July 16, 1855. *Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them.*

* * *

ARTICLE 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

* * *

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to

reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.

* * *

(12 Stat. 975)

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

* * *

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said

lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President.

* * *

Approved April 23, 1904 (33 Stat.L., p. 302)

28 USCS § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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28 USCS § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch 646, § 1, 62 Stat. 964.)

AN ACT To authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled –

* * * * * * *

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows: * * *

Provided, however, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. * * *

"When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. * * *

That section fourteen of said act be, and the same is hereby, amended to read as follows:

"SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; * * *

* * * * * * *

Approved, May 29, 1908. (35 Stat.L., p. 448.)

[May 10, 1926, 44 Stat. 453, 464]

CHAP. 277. – An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1927, and for other purposes.

* * * *

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, $575,000: *Provided*, That of the total amount herein appropriated not to exceed $15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, $100,000; Moiese Canal enlargement, $15,000; South Side Jocko Canal, $40,000; Hubbart Feed Canal, $7,500; Camas A. Canal, $2,500; Continuing construction of power plant, $395,000, of which sum $15,000 shall be immediately available for additional surveys and preparation of plans: *Provided further*, That no part of this appropriation, except the $15,000 herein made immediately available shall be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction

cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123-130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in fee to the United States free of encumbrance to again become a part of the public domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land

within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: *Provided further,* That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: * * *